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In The
Supreme Court of the United States

CONCHA DUBOSE,
Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

Petition For A Writ Of Certiorari
To The Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTION PRESENTED FOR REVIEW

Petitioner Concha Dubose Was Charged with Murder. Her Retained Trial Counsel of Choice Hired an Assistant Lawyer to Advise on Evidentiary and Procedural Questions. Petitioner Barely Knew the Assistant, Never Conferred with Her about the Case, and Never Intended That She Would Try the Case. After Retained Trial Counsel Selected the Jury, He fell ill. The Trial Judge Forced the Accused, over Objection, to Stand Trial with the Assistant as Her Trial Lawyer, Because the Trial Judge Felt the Assistant Was a Competent Lawyer. Was Petitioner Denied Her Qualified Sixth Amendment Right to Be Represented by Retained Counsel of Her Own Choosing?

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS BELOW

The citations of the official and unofficial reports of the opinions and orders entered in the case below are as follows:

Order of Conviction and Sentence, dated February 26, 1997 (Wayne County Circuit Court, Docket No. 94-013107, unreported). App. G.

Michigan Court of Appeals Opinion dated March 16, 1999 (Docket No. 203020, unpublished opinion). App. F.

Michigan Supreme Court Order Denying Leave to Appeal, dated April 18, 2000, *People v. Dubose*, ___ Mich. ___; 617 N.W.2d 335 (2000) (Docket No. 114878) [two Justices would have granted leave]. App. C.

Michigan Supreme Court Order Denying Reconsideration of the denial of leave to appeal, dated August 22, 2000 , ___ N.W.2d (2000) (Docket No. 114878). App. A.

STATEMENT OF JURISDICTION

Petitioner seeks review of a final judgment entered by a state court of last resort, to wit: the Michigan Supreme Court's Order dated April 18, 2000, denying petitioner leave to appeal the March 16, 1999 decision of the Michigan Court of Appeals, affirming petitioner's judgment of conviction and sentence.

After the Michigan Supreme Court's Order denying leave to appeal was entered on April 18, 2000, petitioner filed a Motion for Reconsideration on May 8, 2000. This motion, being filed within 21 days of the Supreme Court's Order denying leave, was timely under MCR [Michigan Court Rule] 7.313(A), (E). The Michigan Supreme Court subsequently, on August 22, 2000, entered an Order denying petitioner's Motion for Reconsideration.

This Petition is timely because the 90-day filing period set forth in Supreme Court Rule 13.1 runs from August 22, 2000, the date on which the Michigan Supreme Court denied rehearing. See Supreme Court Rule 13.3.

The statute conferring jurisdiction on this Court to review on writ of certiorari the judgment in question is 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Constitution, Amend. VI.

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Amend. XIV, § 1.

STATEMENT OF THE CASE

Petitioner Concha Dubose, now 65 years old, had lived a life unblemished by any criminal arrest or conviction until 1997, when she was convicted of second-degree murder and "felony firearm" [possession of a firearm in the commission of another felony].

The prosecution's theory was that Ms. Dubose shot decedent Ira Mc Kay, a friend of hers, while they were both in her car in a Detroit park around midnight in July 1993. The State's case was entirely circumstantial. The state had no murder weapon. There was no evidence of gunpowder residue on petitioner. There were no eyewitnesses. Although decedent was still alive and remained conscious for up to thirty minutes when Ms. Dubose rushed him to the hospital, there was no evidence that he ever accused her of having shot him. There was no confession. No motive was shown. As the Michigan Court of Appeals observed, "the prosecution made no attempt to explain why defendant would want to kill the victim." App. F.

Seasoned police investigators from the Homicide Section of the Detroit Police Department took statements from Ms. Dubose after the shooting, but she was not arrested. Ms. Dubose told them that she was sitting in her vehicle in the passenger seat, talking to Mr. McKay, who was in the

driver's seat. An unknown black male approached the driver's side of the car. She then heard Ira say, "oh," after he waved his arm outside the window, as if motioning someone off. Ira said I've been hit and he fell toward the passenger side of the car.

She felt the person that shot Mc Kay was trying to rob him because she heard "something like give, blank, blank, blank, or give me blank, blank." She did not see the gun because it was too dark. She thought a second person was on the passenger-door side, near a tree, but was not sure. After the black male ran, Ms. Dubose exited the car, got Ira over to the passenger side and drove to the hospital emergency room.

Charges were only brought against petitioner one year after the shooting.

Petitioner retained Trial Counsel Arthur S. Brand. He handled the case from the beginning, through two preliminary examinations, an interlocutory appeal to the Michigan Court of Appeals, subsequent pretrial proceedings, and down to the end of jury-selection when Trial Counsel fell ill with a kidney-stone attack, which ultimately required hospitalization and surgery. App. H. See also App. B.

From the beginning, it was the intent and understanding that Trial Counsel Arthur S. Brand would be trying the case. Mr. Brand was the only counsel Ms. Dubose herself had retained. App. H.

However, while the case was wending its way towards trial, Trial Counsel decided to obtain assistance from another lawyer, Rose Mary C. Robinson ("Assistant Counsel"). Assistant Counsel was retained by Mr. Brand. App. H.

Assistant Counsel's role was clearly secondary. She was to assist Mr. Brand on evidentiary and procedural issues. It was never the intent or understanding that Assistant Counsel would be trying the case. App. H. Assistant Counsel barely knew Ms. Dubose and had not even previously discussed the substance of the case with her. The client only knew that Assistant Counsel was "consulting" on the case. App. D.

Mr. Brand conducted the voir dire. Mr. Brand selected the jury based on the many factors informing any jury selection, including the "chemistry" between himself and potential jurors, and the fact that he intended to have Concha Dubose testify in her own defense. Mr. Brand, not Assistant Counsel, was prepared and expected to handle the opening statement, examination and cross-examination of lay and expert witnesses, and closing argument. Trial Counsel had prepared Ms. Dubose for the presentation of her own testimony before the jury, a key part of the defense strategy. App. B.

When Trial Counsel fell ill, the trial court indicated it would force the assistant to try the case. The assistant lawyer made it clear that she only appeared in an advisory and

supportive role, and asked the trial court to honor defendant's right to be represented by counsel of choice, stating:

> I have been *asked by Mr. Brand* if I would sit second chair for the purpose of *helping him* with evidentiary rules of evidence or any kind of procedural matters. I'm really here as a procedural lawyer as for support for Mr. Brand. *He is the lawyer who was trying this case and whose client is Miss Dubose.* I would ask the court to adjourn so that Miss Dubose can have *the attorney of her choice, the lawyer she hired, Mr. Brand.*

App. H (emphasis supplied). Ms. Dubose herself then clearly indicated on the record that she wanted Mr. Brand to try her case, not his assistant. App. H.[1]

The trial court forced defendant to go through trial *represented by a lawyer she had never spoken to about her trial before trial date*. App. D. Assistant Counsel was forced

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[1]In view of these facts, which are not contradicted elsewhere in the record, the Michigan Court of Appeals' assertions that both counsel had worked on the case together for some time and that Assistant Counsel was "fully apprised of the facts surrounding the case" and was"fully prepared to proceed to trial" were clearly erroneous and, indeed, inexplicable. *Cf.* App. F.

to proceed with the never-easy task of conducting a jury trial, seeking to formulate a trial strategy while at the same time preparing cross examination based on the discovery materials Trial Counsel Brand had amassed.

Forcing petitioner to trial with Assistant Counsel was highly prejudicial. Assistant Counsel did not have the benefit of Trial Counsel's experience with the record in this particular case, including the voluminous medical records and complex medical testimony. As a result the jury was not advised that the physical evidence and expert testimony showed a serious flaw in the prosecution's theory that the shooting was at close range, and petitioner must have done it because she was the only other person in the car. Further, petitioner's defense was prejudiced when she herself did not testify, although her testimony would have been at the heart of Trial Counsel's trial strategy. App. B.

The cross-examination of assistant medical examiner Laning Davidson evidences the prejudice that resulted from the absence of Petitioner's counsel of choice. At the second preliminary examination, Mr. Brand had extensively cross-examined Dr. Davidson and elicited several critical admissions. Dr. Davidson admitted there was no powder-burning inside the right-flank wound. He admitted the decedent had been wearing the shirt and T-shirt later introduced in evidence at trial. He also admitted that there was no gunshot residue on the outside or the inside of the

shirt at or near the point of the holes, and the hole in the left sleeve could have been a bullet hole. Davidson also claimed to have reached the conclusion that this was a close range shooting from examining the body at autopsy–not after reviewing photographs several months later. If Trial Counsel had been there to draw out these points, Dr. Davidson's significant change in testimony, and the inconsistency with the physical evidence, would have been exposed.

Petitioner's defense was prejudiced because the jury was not aware of these facts. Proof that the decedent was wearing the shirt and undershirt at the time of death would have compounded the mystery and undercut the prosecution's case. The prosecution's theory was that there was a close-range firing into the right side. But there were apparent bullet-holes in both the decedent's shirt and undershirt, consistent with a wound to the *left* arm. And there was absolutely no trace evidence on the shirts consistent with such close-range firing. If the medical examiner had been confronted with his former testimony and forced to admit that decedent was wearing the bullet-riddled shirt and undershirt at the time of death, this could very well have influenced at least one juror to entertain a reasonable doubt. Proving this was central to Trial Counsel's trial strategy. App. B.

Trial Counsel's strategy was plainly different in another critically important way. At the heart of his trial strategy was the testimony of petitioner herself. He obviously

selected a jury with that fact in mind. The entire strategy was sabotaged when the trial court forced petitioner to trial with substitute trial counsel. Substitute counsel, lacking Trial Counsel's opportunity to study the file and prepare for trial, and lacking Trial Counsel's familiarity with the client and his relationship of trust and confidence with the client, would understandably have been reluctant to put the petitioner on the witness stand.

Petitioner timely and properly raised the question presented at every stage of the state proceedings. She specifically asserted her desire to be represented at trial by retained counsel of her own choosing, and objected to being forced to proceed with her trial lawyer's assistant, who had been hired by Trial Counsel, not Ms. Dubose. App. H.

On direct appeal to the Michigan Court of Appeals, Petitioner contended that her Sixth Amendment right to retained counsel of choice was infringed when the trial court forced her into trial with counsel not of her own choosing, simply because the trial court felt that the assistant counsel was competent.

When the Michigan Court of Appeals affirmed her convictions, Petitioner timely sought discretionary review in the State court of last resort by filing an Application for Leave to Appeal with the Michigan Supreme Court. In that Application she continued to press (as Argument I) the issue that her Sixth Amendment right to retained counsel of choice

had been denied. With two Justices dissenting, the Michigan Supreme Court denied petitioner's Application for Leave to Appeal, by Order dated April 18, 2000. App. C.

Petitioner timely filed a Motion for Reconsideration within 21 days, pursuant to Michigan Court Rule 7.313(E). The only issue raised in the Motion was the Sixth Amendment issue raised herein. The Michigan Supreme Court denied reconsideration by order dated August 22, 2000. App. A.

REASON FOR GRANTING THE PETITION

WHEN PETITIONER CONCHA DUBOSE'S RETAINED TRIAL COUNSEL FELL ILL DURING JURY SELECTION, THE TRIAL COURT FORCED HER TO CONTINUE TRIAL, REPRESENTED BY A LAWYER HER RETAINED COUNSEL HAD HIRED TO ASSIST ONLY ON PROCEDURAL MATTERS, AND WITH WHOM MS. DUBOSE HAD NEVER DISCUSSED THE CASE. THE STATE COURTS HELD THAT PETITIONER WAS NOT DENIED HER QUALIFIED SIXTH AMENDMENT RIGHT TO COUNSEL. THE RULING BELOW HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND OF SEVERAL CIRCUITS OF THE COURT OF APPEALS.

This Court should grant a writ of certiorari in this case because the Michigan appellate courts have decided an important Federal Constitutional question in a way that conflicts with relevant decisions of this Court and of various Circuits of the United States Court of Appeals, as set forth *infra*. Alternatively, certiorari is appropriate because the Michigan courts have decided an important question of Federal Constitutional law that should be settled by this

Court: whether the qualified Sixth Amendment right to retained counsel of choice may be abridged simply because the trial judge feels the replacement attorney is competent.

The issue is of fundamental importance not just to Petitioner Concha Dubose, but to countless other defendants who will find themselves in similar straits. If the decision below is allowed to stand, the right to retained counsel of choice will be a hollow one, because trial judges will have free rein to replace retained counsel by simply saying, "I need to move my docket, and I don't personally see a problem with Lawyer X representing you."

Petitioner Concha Dubose asserts that she was denied her constitutional rights to proceed through retained counsel of her choice, as guaranteed by the Sixth Amendment.

The relevant facts are undisputed. The record shows that Concha Dubose retained Mr. Brand to be her trial counsel. Attorney Robinson made it clear on the record that she was only appearing in an advisory and supportive role, not as trial counsel. She stated, "I have been *asked by Mr. Brand* if I would sit second chair for the purpose of *helping him* with evidentiary [or] procedural matters." She was in court "as a procedural lawyer as for support for Mr. Brand." She made it clear that "*He [Mr. Brand] is the lawyer who was trying this case and whose client is Miss Dubose*." She asked for an adjournment "so that Miss Dubose can have *the attorney of her choice, the lawyer she hired, Mr. Brand*."

App. H. (emphasis supplied). The client was equally clear in stating on the record that she wanted Mr. Brand there to try the case for her. App. H.

The record shows that the trial court did not engage in any balancing of relevant factors before making its decision to deny relief. The trial court did not indicate that there was any history of delay by defendant. The Court did not question that a bona fide medical emergency in fact existed. Nor did the Court indicate any compelling reason why there could not be an adjournment. Significantly, the prosecution did not oppose the motion, which is powerful evidence that there would have been no prejudice to the State. The only factor the trial court considered in forcing petitioner to proceed with trial was that the Court felt Assistant Counsel was a competent lawyer. App. H.

The trial court focused on its own assessment of Assistant Counsel's experience, giving no consideration to the fact that petitioner's chosen trial counsel had conducted two preliminary exams, worked up the case, devised the trial strategy, and selected the jury. Precluding Trial Counsel's participation prevented the jury from learning of the inconsistencies in the scientific and physical evidence, and caused defendant not to testify. If Trial Counsel had been able to implement the trial strategy he had devised in selecting this particular jury, that strategy would have profoundly changed the dynamics of the trial.

This Court should hold that the qualified Sixth Amendment right to retained counsel of choice may not be infringed merely because the trial court personally believes that a substitute defense lawyer is competent.

A. An Accused Has a Qualified Sixth Amendment Right to Retained Counsel of the Accused's Own Choosing.

The Sixth Amendment guarantees every accused the assistance of counsel.

> Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

United States v. Cronic, 466 U.S. 648, 654; 104 S.Ct. 2039; 80 L.Ed.2d 657 (1984). The right to counsel encompasses a fair opportunity to secure counsel of the accused's own choice. *Powell v. Alabama*, 287 U.S. 45, 53, 68-69; 53 S.Ct. 55; 77 L.Ed. 158 (1932); *United States v. Washington*, 797 F.2d 1461, 1465 (9th Cir. 1986); *United States v. Mullen*, 32 F.3d 891, 895 (4th Cir. 1994); *United States v. Poulack*, 556 F.2d 83, 86 (1st Cir. 1977), *cert. denied*, 434 U.S. 986; 98 S.Ct. 613; 54 L.Ed.2d 480 (1977).

"That a person who happens to be a lawyer is present at the trial alongside the accused [is] not enough to satisfy the constitutional command." *Powell v. Alabama*, 287 U.S. at 58. The Sixth Amendment guarantees "the right to a reasonable

opportunity to *select* and *be represented by* chosen counsel." *Gandy v. Alabama*, 569 F.2d 1318, 1323, 1327 (5th Cir. 1978) (emphasis supplied); *Linton v. Perini*, 656 F.2d 207, 211-212 (6th Cir. 1981), *cert. denied*, 454 U.S. 1162; 71 L.Ed.2d 318; 102 S.Ct. 1036 (1982) (right to retained counsel of choice is "essential component" of Sixth Amendment right to counsel); *United States v. Jones*, 160 F.3d 641 (10th Cir. 1998).

"The right to counsel of choice [is] premised on respect for the individual." *Wilson v. Mintzes*, 761 F.2d 275, 286 (6th Cir. 1985), *cert. denied*, 506 U.S. 1011 (1992) and 507 U.S. 1007 (1993). This right "reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding." *Flanagan v. United States*, 465 U.S. 259, 267-268; 79 L.Ed.2d 288; 104 S.Ct. 1051 (1984).

> The Amendment does not concern itself with who the counsel may be or how the counsel may be selected. But if a defendant in a criminal case desires to hire his own counsel, in order that the object of the Sixth Amendment be met, such defendant must have fair opportunity and reasonable time to employ counsel of his own choosing.

United States v. Johnston, 318 F.2d 288, 291 (6th Cir. 1963).

Ms. Dubose clearly had a Sixth Amendment right to be represented by retained counsel of her own choosing.

B. To Vindicate this Sixth Amendment Right, Courts Must Recognize a Presumption in Favor of a Defendant's Counsel of Choice.

"An accused who is financially able to retain counsel must not be deprived of the opportunity to do so." *United States v. Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069; 59 L.Ed.2d 34; 99 S.Ct. 837 (1979). To vindicate this right, the trial court is required to recognize a presumption in favor of a defendant's counsel of choice. *Wheat v. United States*, 486 U.S. 153, 163-164; 108 S.Ct. 1692 (1988); *Serra v. Michigan Department of Corrections*, 4 F.3d 1348, 1354 (6th Cir. 1993), *cert. denied*, 501 U.S. 1201; 114 S.Ct. 1317; ___ L.Ed.2d ___ (1994).

C. The Right to Choose Counsel is Critical Because Selection of Counsel Is the Most Important Decision a Defendant Makes in Shaping His or Her Defense.

The accused's right to choose an attorney is a corollary of the right to decide what type of defense she will present. *Wilson v. Mintzes*, 761 F.2d at 279 n. 5; *United States v. Collins*, 920 F.2d 619, 625 (10th Cir. 1990), *cert. denied*, 114 L.Ed.2d 108; 111 S.Ct. 2022 (1991). "[T]he most important decision a defendant makes in shaping his defense is his selection of an attorney." *United States v. Laura*, 607 F.2d 52, 56 (3rd Cir. 1979).

A defendant learns about the charges being brought, the weaknesses of the government's case, and possible strategies through an attorney. *Mintzes*; *Laura*. A defendant also allocates authority to make important decisions, some affecting constitutional rights, to an attorney. *Mintzes*; *Laura*; see also *Morris v. Slappy*, 461 U.S. 1, 21; 75 L.Ed.2d 610; 103 S.Ct. 1610 (1983) (Brennan, J., dissenting).

"Attorneys are not fungible." *United States v. Laura*, 607 F.2d at 56; *Collins*, 920 F.2d at 625.

> If all attorneys were the same, the choice of an attorney would be of no moment... Attorneys are different, and their differences can influence the defense presented by a defendant. Therefore, a defendant is afforded an opportunity to select an attorney.

United States v. Nichols, 841 F.2d 1485, 1502 (10th Cir. 1988). As any seasoned judge or trial lawyer knows, the selection of one attorney over another can profoundly affect the course and outcome of trial. *Nichols*, 841 F.2d at 1502. And as petitioner will demonstrate shortly, the selection here did in fact profoundly affect the trial in this case.

D. Abridging an Accused's Right to Retained Counsel of Choice Is a "Drastic Step" Which May Only Be Taken Where it Is Essential to Further Some "Overriding" Public Interest.

A court may not "arbitrarily refuse to allow the defendant to retain the lawyer of his choice." *Ford v. Israel*, 701 F.2d 689, 692 (7th Cir. 1983), *cert. denied*, 464 U.S. 832; 78 L.Ed.2d 114; 104 S.Ct. 114 (1983); *United States v. Rankin*, 779 F.2d 956, 958 (3rd Cir. 1986); *Birt v. Montgomery*, 725 F.2d 587, 592 (11th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 874; 83 L.Ed.2d 161; 105 S.Ct. 232 (1984); *Linton v. Perini*, 656 F.2d at 209 (trial courts "in the name of calendar control" cannot arbitrarily and unreasonably interfere with a client's right to retained counsel of choice).

The right to counsel of choice "should be deprived only where such drastic action is necessary to further some overriding social or ethical interest." *United States v. Hobson*, 672 F.2d 825, 828 (CA 11, 1982), *cert. denied*, 459 U.S. 906; 103 S.Ct. 208; 74 L.Ed.2d 166 (1982). To vindicate the right to retained counsel of choice, trial courts should consider such factors as: the length of delay; previous continuances; inconvenience to litigants, witnesses, counsel, and the court; whether the delay is purposeful or caused by the accused; the availability of other competent counsel; the complexity of the case; and whether denying the continuance

will lead to identifiable prejudice. *Mintzes*, 761 F.2d at 281. Depriving an accused of retained counsel of choice must be justified by adequate findings on the record explaining the trial court's rationale. *United States v. Laura*, 607 F.2d at 60. Here there were no such adequate findings.

E. The Trial Court Erroneously Decided to Deny Counsel of Choice by Focusing Only on the Court's Own Assessment That the Replacement for Trial Counsel of Choice Was a Competent Lawyer.

Here the trial court arbitrarily failed to consider the critically important factor that Concha Dubose wanted to be represented by retained counsel of choice. The trial court did not find that petitioner had engaged in a history of delay, or that her request was frivolous or made for purposes of delay or manipulation of the justice system. See *United States v. Fowler*, 605 F.2d 181, 183 (5th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980). Trial Counsel's illness was obviously completely unforeseen and beyond petitioner's control.

Assistant Counsel, as stated on the record without contradiction, was brought into the case by Trial Counsel, not by Ms. Dubose, and her role was to be strictly the auxiliary one of assisting Trial Counsel with advice on matters of evidence and procedure. Assistant Counsel was not "prepared to try the case" and was not "retained as lead or associate counsel." See *United States v. Burton*, 584 F.2d at 490-91;

United States v. Gantt, 140 F.3d 249 (D.C. Cir. 1998), *cert. denied*, 119 S.Ct. 361 (1998). In this case, Assistant Counsel's own remarks show that she certainly was not expected to be lead counsel, and as she was only to be involved in evidentiary and procedural matters, that is obviously a far cry from being prepared to be lead counsel on a capital case. *Cf. Giacalone v. Lucas*, 445 F.2d 1238, 1241-1242 (6th Cir. 1971), *cert. denied*, 405 U.S. 922; 92 S.Ct. 960; 30 L.Ed.2d 793 (1972) (one retained counsel's voluntary hospitalization for checkup did not require third adjournment of trial where all three retained defense counsel worked as a team and were prepared to try case).

The trial court's comments show that it focused almost exclusively on its own assessment of the qualifications of the replacement attorney, rather than properly balancing the relevant factors after giving due regard to the ordinarily paramount interest of the client in being represented by retained counsel of choice. A trial court errs by "focus[ing] only on the attorney's qualifications and competence." *United States v. Lagunas*, 48 F.3d 1229 (9th Cir. 1995).

> [T]he trial judge may not insist on such expeditiousness that counsel for the defendant lacks reasonable time to prepare for trial; stripping away the opportunity to prepare for trial is tantamount to denying altogether the assistance of counsel for the defense.

United States v. Burton, 584 F.2d at 488-491.

The Sixth Amendment right to counsel requires courts to pay "considerable deference" to a criminal defendant's actual choice of counsel. *United States v. Diozzi*, 807 F.2d 10, 12 (1st Cir. 1986), *cert. denied*, 479 U.S. 846; 107 S.Ct. 164; 93 L.Ed.2d 103 (1986). Here the trial court did not give "considerable deference" to the client's choice of counsel; the trial court *ignored* this critical factor.

United States v. Mardian, 546 F.2d 973, 979-980 (D.C. Cir. 1976) presents a striking parallel. Robert Mardian, a former Assistant Attorney General, was on trial for conspiracy arising out of the infamous Watergate break-in. Two weeks into the trial, Mardian's lead counsel became ill and was hospitalized. Mardian's co-counsel had been employed by trial counsel, not the client, and had only met the client at the outset of trial. Co-counsel moved to sever because lead counsel was unavailable. The trial court denied relief, stressing that co-counsel had substantial trial experience and expressing confidence in co-counsel's ability to take over for lead counsel.

The Court of Appeals ordered a new trial. The unchallenged competency of co-counsel did not trump the client's right to have his chosen trial lawyer act as lead counsel. The Court stated that the accused

> has a special interest in representation by experienced counsel of his own choice in

> whom he can have the kind of confidence that grows from long-standing acquaintance -- at least if his choice can be honored without undue disruption.

The Court also attached the "highest importance" to the fact that the Government did not oppose Mardian's motion.

Here, as in *Mardian*, a bona fide emergency was created by lead trial counsel's unforeseen illness; second-chair counsel entered the case at the instance of the lead lawyer, not the client; the client did not have a relationship with the second-chair lawyer and did not intend for that lawyer to try the case; and the trial court emphasized second-chair counsel's trial experience in denying relief. Here, as in *Mardian*, the decision to force petitioner to continue with second-chair counsel was arbitrary.

> The right to counsel of choice cannot be denied without a showing that the exercise of that right would interfere with the fair, orderly and expeditious administration of justice. [C]hoice of counsel must be respected unless it would unreasonably delay proceedings.

United States v. Panzardi Alvarez, 816 F.2d 813 (1st Cir. 1987). Here the trial court failed to indicate how the interests in the administration of justice, including the avoidance of undue delay, would have been compromised if petitioner had been allowed her right to retained counsel of choice.

A disqualification of counsel of choice is arbitrary not because it is substantively "erroneous," but because it was the product of a failure to balance proper considerations of judicial administration against the right to counsel. *Fuller v. Diesslin*, 868 F.2d 604, 607 n3 (3rd Cir. 1989), *cert. denied, sub nom Perretti v. Fuller*, 493 U.S. 873; 110 S.Ct. 203 (1989); *United States v. Laura*, *supra*.

Where the trial court takes a "wooden approach" and fails to make record-supported findings balancing the right to counsel with the demands of the administration of justice, there has been an arbitrary denial of the Sixth Amendment right to counsel of choice. *Fuller v. Diesslin*, at 611; *United States v. Voigt*, 89 F.3d 1050 (3rd Cir. 1996), *cert. denied*, 519 U.S. 1047; 117 S.Ct. 623 (1996).

Here, the trial court did not inquire into the availability of Trial Counsel (who would have been available in two weeks). App. B. There was nothing to indicate a history of delay or unfair tactics by petitioner. The trial prosecutor did not object to petitioner's request to be represented by retained counsel of choice. The decision to force petitioner to go to trial with a virtual stranger as her counsel was apparently based solely on the trial court's assessment of the competence of the substitute counsel. The Sixth Amendment demands more.

The trial court failed to appreciate that lawyers are not fungible. A hypothetical makes the point. Assume that a

client retains F. Lee Bailey. Bailey's plane is late in arriving. The trial court replaces Bailey with a Public Defender with two years' experience. If the only question is whether the replacement counsel is competent, the qualified right to counsel of choice effectively ceases to exist. There would never be a case in which replacement of chosen counsel would violate the Sixth Amendment, unless a defendant could prove that replacement counsel was simply incompetent.

The fact is that lawyers have different strengths, different educations, and different professional experiences. Two lawyers may both be competent, but they may have very different views on how to try a particular case.

If trial courts can simply replace counsel of choice, the Sixth Amendment is substantially weakened. Trial courts could easily replace a client's counsel of choice, knowing that as long as the replacement lawyer was not manifestly incompetent the decision was immune from review.

In addition to those general concerns, the trial court failed to appreciate the peculiar disadvantages existing here, where counsel of choice was replaced *after* the jury was selected. Trial counsel had selected a jury that he felt was most compatible with his trial strategy and with Trial Counsel himself. Jury selection always reflects a complex calculus of considerations, including juror reactions to the lawyer's own personality. That calculus is necessarily different with every case, every client, and every lawyer. The trial court failed to

appreciate the prejudice that would result because the absence of the lawyer who selected the jury would, in itself, profoundly change the personality dynamics operating at trial.

"[A] defendant must be given a reasonable opportunity to *employ and consult with* counsel; otherwise the right to be heard by counsel would be of little worth." *Chandler v. Fretag*, 348 U.S. 3, 10; 99 L.Ed. 4; 75 S.Ct. 1 (1954) (emphasis supplied). In this case, petitioner had not employed Assistant Counsel, and had precious little time to consult her when she unexpectedly catapulted from the periphery into the role of sole trial counsel. Assistant Counsel had only been there in an auxiliary capacity. She had not interviewed the witnesses. She had not conducted the two preliminary examinations. She had not done the trial preparation. She had not discussed the substance of the case with the petitioner, whom she hardly knew. All that was unnecessary, because she did not expect to be trying the case. App. B, D and H. Yet she was suddenly precipitated into the case by the illness of Trial Counsel and the unanticipated ruling of the trial court. She had no opportunity to do a prompt and thoroughgoing investigation because the trial court was intent on proceeding with the trial.

Assistant Counsel's trial experience should not have been, in effect, the only factor considered in denying relief. Lawyers are not fungible. Whether retained counsel of choice was F. Lee Bailey, or the family lawyer trusted implicitly, the

trial judge could not override that choice simply because he was favorably disposed toward Assistant Counsel.

Here the trial court erroneously considered only two factors: the court's own assessment of the experience of the second-chair counsel and, implicitly, the desire to move the docket. Moving the docket cannot be the only consideration justifying denial of the right to retained counsel of choice.

Preparing to be directly and primarily responsible for trying a major felony case takes single-minded effort and painstaking mastery of a mass of facts and details peculiar to that case. Particularly is this true where, as here, the case involves multiple medical experts and numerous medical reports, in addition to the numerous fact witnesses. The assumption that a lawyer playing a peripheral and subsidiary role can suddenly be thrust into the role of lead lawyer, without prejudicing the case and the client, does not accord with common sense. Adequate preparation for trial is often more important to the effective assistance of counsel than forensic skill exhibited in the courtroom. *Moore v. United States*, 432 F.2d 730, 735 (3rd Cir. 1970).

The trial court erred in relying on its own assessment of second-chair counsel, and converted the valuable right to retained counsel of choice into a hollow promise.

The Michigan Court of Appeals found that denial of the right would not be structural error. App. F. This was clearly incorrect. Denial of the right is structural error

requiring automatic reversal. *Arizona v. Fulminante*, 499 U.S. 279, 307-310; 111 S.Ct. 1246; 113 L.Ed.2d 302 (1991); *Flanagan v. United States*, 465 U.S. 259, 267-268; 104 S.Ct. 1051; 79 L.Ed.2d 288 (1984) (defendant denied Sixth Amendment right to retained counsel of choice need not show prejudice); *United States v. Mays*, 69 F.3d 116, 122 (6th Cir. 1995), *cert. denied*, 517 U.S. 1246 (1996).

Even if the error were not structural, it would be a preserved, constitutional "trial error" requiring reversal unless it was harmless beyond a reasonable doubt because there was "*no reasonable possibility*" that the error complained of "*might have contributed*" to the conviction. *Chapman v. California*, 386 U.S. 18, 23; 87 S.Ct. 824; 17 L.Ed.2d 705 (1967); *Arizona v. Fulminante*, 499 U.S. at 307-309. There was a "reasonable possibility" that removal of Trial Counsel contributed to the convictions, because Trial Counsel would have presented petitioner's testimony and exposed serious defects in the forensic evidence.

CONCLUSION AND RELIEF REQUESTED

The trial court had no right to replace retained counsel of choice simply because the trial court felt that replacement counsel was competent. Removing petitioner's chosen trial counsel profoundly altered the trial strategy and prevented the jurors from learning about crucial flaws in the prosecution's scientific evidence, as well as depriving them of "the most important witness. . . the defendant [her]self." *Rock v.*

Arkansas, 483 U.S. 44, 51-52; 107 S.Ct. 2704; 97 L.Ed.2d 37 (1987). The decision below infringed upon Petitioner's Sixth Amendment rights, applicable to the States by virtue of the Fourteenth Amendment.

A Writ of Certiorari should issue to the Michigan Supreme Court.

Respectfully submitted,
Ashford & Associates,
a Professional Corporation

By: Linda D. Ashford (P 29303)
Attorney for Petitioner Concha Dubose
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November 2000

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Order
Entered: August 22, 2000

Michigan Supreme Court
Lansing, Michigan

114878(72)

Elizabeth A. Weaver,
Chief Justice
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

SC: 114878
COA: 203020
CONCHA DUBOSE, **Rec Ct: 94-013107**
Defendant-Appellant.

On order of the Court, the motion for reconsideration of this Court's order of April 18, 2000 is considered, and it is **DENIED,** because it does not appear that the order was entered erroneously.

Kelly, J., would grant the motion for reconsideration and on reconsideration would grant leave to appeal.

d0815

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 22, 2000 /s/ Jacqueline B. McKinnon
Deputy Clerk

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

Supreme Court No. 114878

-vs-

Court of Appeals No. 203020

Lower Court No. 94-013107

CONCHA DUBOSE,
Defendant-Appellant.

Wayne County Prosecutor
Attorney for Plaintiff-Appellee
Frank Murphy Hall of Justice
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Phone: (313) 224-5777

ASHFORD & ASSOCIATES,
a Professional Corporation
by: Linda D. Ashford (P29303)
Attorney for Defendant-Appellant
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Detroit, MI 48226
Phone: (313) 237-6316

AFFIDAVIT IN SUPPORT OF MOTION FOR RECONSIDERATION

Arthur S. Brand, being first duly sworn, states that if called as a witness he would be competent to testify to the following facts, on his personal knowledge:

1. I was retained by defendant Concha Dubose to represent her in proceedings in the above case, up to and including jury trial.

2. I was the only counsel Ms. Dubose engaged to try her case.

3. I was the lawyer who obtained the discovery, prepared for and conducted two lengthy preliminary examinations and other proceedings in the trial court. After an interlocutory appeal, the case was set for a jury trial.

4. As the case had progressed towards trial, I obtained assistance from another attorney, Rose Mary C. Robinson. Her role was to be a limited one. She was to assist me by providing advice during trial on evidentiary and procedural issues that might arise.

5. I was prepared to, and intended to, try the case from beginning to end including selecting a jury, making the opening statement, handling the examination of witnesses and expert witnesses, and making the closing argument.

6. I was representing Ms. Dubose as trial began. I prepared for and handled the jury selection process. However, down towards the end of jury-selection I fell seriously ill.

7. When I fell ill with kidney stones and could not continue, I sought medical treatment and was briefly hospitalized. I never indicated to the client that she should

have Ms. Robinson try the case. Nor did I request that Ms. Robinson try the case. It was always my intention to try the case myself. I was the lawyer who had worked up the case and who was familiar with not only the testimony of the witnesses at the preliminary examinations, but their demeanor as well.

8. Ms. Robinson had not been substantially involved in the formulation of trial strategy, because her role at trial was only intended to be secondary.

9. If the trial court had inquired as to my availability, I would have indicated that I could be available within two (2) weeks.

10. Any delay in my ability to resume the client's representation would have been minimal. (I was out of the hospital before the trial was even completed, and I briefly reappeared in the trial, although I was still not feeling well enough to take over the entire burden of the trial and had to leave again; and in any event I had missed a considerable portion of the trial due to my illness and absence.)

11. This case did not involve any history of adjournments or delaying tactics by the defense. The only substantial delay in the proceedings was brought about by the prosecution, as a result of the interlocutory appeal.

12. My trial preparation with my client did not involve Ms. Robinson, because of her anticipated limited involvement in the case. To my knowledge, the client had never had any conference with Ms. Robinson about the trial before trial date, because there was no perceived need.

13. It is totally inaccurate to say that both Ms. Robinson and I were retained by Ms. Dubose as her counsel of choice for trial purposes. I was the client's retained counsel of choice, not Ms. Robinson. I had a longstanding relationship of trust and confidence with the client, but the client barely knew Ms. Robinson. It was always the intention and understanding of Ms. Dubose, Ms. Robinson, and myself that I would be trial counsel and Ms. Robinson would be there only in an advisory capacity.

14. After I fell ill, on information and belief Ms. Robinson stated to the trial court as follows:

> I have been *asked by Mr. Brand* if I would sit second chair for the purpose of *helping him* with evidentiary rules of evidence or any kind of procedural matters. I'm really here as a procedural lawyer as for support for Mr. Brand. *He is the lawyer who was trying this case and whose client is Miss Dubose*. I would ask the court to adjourn so that Miss Dubose can have *the attorney of her choice, the lawyer she hired, Mr. Brand.*

(T, 51; 2/25/97) (emphasis supplied). What Ms. Robinson stated as an officer of the Court was true and accurate.

15. On information and belief, defendant Concha Dubose stated on the record at that same time, unequivocally and without qualification, that she wanted me, not Ms. Robinson, to try the case for her. (T, 51; 2/25/97).

16. My trial strategy included calling Concha Dubose to testify in her own behalf. My client was a mild-mannered, polite, soft-spoken woman of immense dignity, with no prior criminal record, never even having been arrested. In my professional opinion, based on many years of trial practice, Concha Dubose would have made an excellent impression on a jury.

17. Had I been representing defendant Dubose at trial, the strategy would have been different in several respects. First, in all likelihood Ms. Dubose would have testified. Second, the cross-examination of assistant medical examiner Laning Davidson would have proceeded differently. At the second preliminary examination, I had extensively cross-examined Dr. Davidson and elicited several critical admissions. Dr. Davidson admitted there was no powder-burning inside the right-flank wound. He also admitted that the decedent had been wearing the shirt and T-shirt introduced in evidence at trial. He also admitted that there was no gunshot residue on the outside or the inside of the shirt at or near the point of the holes. He also admitted that the hole in the left sleeve could have been a bullet hole. Davidson also claimed to have reached the conclusion that this was a close range shooting from examining the body at autopsy–*not* after reviewing photographs several months later. (T, 45, 35-36, 42, 46-47; 3/29/95).

18. Based on my familiarity with the record, I would have drawn out these admissions at trial. The jury would have known that Dr. Davidson's testimony dramatically

changed, and that it did not fit with the physical evidence. This would have been a powerful argument for reasonable doubt. The absence of such evidence compounded the mystery and undercut the prosecution's case. The prosecution's theory was that there was a close-range firing into the right side. But there are apparent bullet-holes in both the decedent's shirt and undershirt, consistent with a wound to the *left* arm. And there was absolutely no trace evidence on the shirts consistent with such close-range firing.

19. If the medical examiner had been confronted with his former testimony and forced to admit that decedent was wearing the bullet-riddled shirt and undershirt at the time of death, this would have dealt a devastating blow to his testimony, and to the credibility of the prosecution's case.

Further affiant sayeth not.

/s/ Arthur S. Brand
ARTHUR S. BRAND

Subscribed and sworn to before me this 2nd day of May 2000.
/s/ Sharon Tyra
SHARON TYRA

Notary Public, Wayne County, Michigan
My commission expires: 11/03/03

Order
Entered: April 18, 2000

Michigan Supreme Court
Lansing, Michigan

114878

Elizabeth A. Weaver,
Chief Justice
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v.

SC: 114878
COA: 203020
CONCHA DUBOSE, **Rec Ct: 94-013107**
Defendant-Appellant.

On order of the Court, the application for leave to appeal from the March 16, 1999 decision of the Court of Appeals is considered, and it is **DENIED,** because we are not persuaded that the questions presented should be reviewed by this Court

Cavanagh and Kelly, JJ., would grant leave to appeal.

C0413

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 18, 2000 /s/ Corbin R. Davis
Clerk

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-vs-

Supreme Court No. ____
Court of Appeals No. 203020
Lower Court No. 94-013107

CONCHA DUBOSE,
Defendant-Appellant.

State of Michigan }
ss
County of Wayne }

AFFIDAVIT OF APPELLANT CONCHA DUBOSE

CONCHA DUBOSE, being first sworn, says if called as a witness I can testify competently, based on personal knowledge, to the following facts:

1. I am the defendant in the above case.

2. In 1994, I retained Attorney Arthur S. Brand to represent me at trial.

3. Mr. Brand was my lawyer through the whole time the case was pending. He was at the preliminary examinations and my pretrial proceedings. I had expected he would be my lawyer at trial.

4. Before my jury trial started in 1997, Mr. Brand told me that he would be consulting with another attorney, Rose Mary C. Robinson.

5. I believe Mrs. Robinson was in the courtroom one day at a hearing before trial. Mr. Brand handled the hearing. As I recall, Mrs. Robinson sat on the bench behind us.

6. Before the trial, I did not have any conferences or in-depth conversations with Mrs. Robinson about the case. I did not expect that she would be my trial lawyer, and to the best of my knowledge, neither did she. Mr. Brand was supposed to try the case.

7. When Mr. Brand had to leave the trial after jury selection, it was very upsetting to me. Mr. Brand had been my lawyer for a long time. He knew all about the case from the beginning, because he was there every step of the way. I had talked about the case with him many times. I had confidence in him. I barely knew Mrs. Robinson.

8. I did not hire Mrs. Robinson; Mr. Brand did. It was very upsetting and unnerving to me that the judge forced me to go to trial with a substitute lawyer, especially when the lawyer told the judge that she and I did not even

have a chance to discuss the case, but the judge made me go to trial with her anyway, when I had hired Mr. Brand to try my case.

/s/ Concha DuBose
CONCHA DUBOSE

Subscribed and sworn to before
me on June 11, 1999
/s/ Robin L. Ward
ROBIN L. WARD

Notary Public, Wayne County, Michigan
My commission expires: 5-23-02

Court of Appeals, State of Michigan

ORDER

People of MI v. Concha Dubose

Docket No. 203020

LC No. 94-013107

Janet T. Neff
Presiding Judge

Michael J. Kelly

Harold Hood
Judges

The court orders that the motion to substitute Attorney Linda D. Ashford for Attorney Arthur S. Brand is **GRANTED.** The court further orders that the motion of rehearing is **DENIED.**

/s/ Janet T. Neff
Presiding Judge

STATE OF MICHIGAN
COURT OF APPEALS

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

May 26, 1999 /s/ Carl L. Gromek
Date Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, ***Plaintiff - Appellee,*** **UNPUBLISHED**
March 16, 1999

v

No. 203020
Recorder's Court
LC No 94-013107

CONCHA DUBOSE, ***Defendant - Appellant.***

Debore: Neff, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial convictions for second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to five to ten year's imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant was granted bond and commencement of her sentence was deferred until disposition of this appeal. We affirm.

I

Defendant first argues that the trial court erred in denying her motion for directed verdict where the court, on the record, declared that there was insufficient evidence to support a conviction. We disagree.

We review the validity of a motion for a directed verdict by the same standard as the trial court. *People v*

Warren, 228 Mich App 336, 345-346; 578 NW2d 692 (1998). The trial court must consider the evidence presented by the prosecutor up to the time the motion was made in a light most favorable to the prosecution. *Id.* If a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt, the court must deny the motion. *Id.* However, if the evidence is insufficient to support a conviction, due process requires that the trial court direct a verdict of acquittal. *People v Lemmon*, 456 Mich 625, 633; 576 NW2d 129 (1998).

Prior to trial, the court had granted defendant's motion to quash the information based on the fact that insufficient evidence had been presented at the preliminary examination to support a bindover. However, this Court reversed the decision of the trial court and ordered the trial to commence. *People v DuBose*, unpublished order of the Court of Appeals, entered 8/28/96 (Docket No. 1887461). Following the prosecution's proofs at trial, defendant moved for a directed verdict. The court indicated that it wanted to grant the motion, but held the decision in abeyance. Only after the-jury returned their verdict did the court deny the motion. On the record, the court indicated that, but for the earlier reversal, it would have granted defendant's motion. Although it was error for the court to postpone its decision on a motion for a directed verdict until after the jury's deliberations, MCR 6.419, the error was harmless where the prosecution presented sufficient evidence to convict defendant. *People v Higgs*, 209 Mich App 306, 307; 530

NW2d 182 (1995). The crime of second-degree murder requires that the defendant cause the death of another with malice and without justification. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempt to commit a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

In this case, the jury was required to make an inference that, because the victim was killed by a close-range entry wound to the right flank in defendant's car where defendant had been a passenger, defendant must be responsible for the victim's death. The prosecution presented the testimony of the victim's treating physician and the medical examiner. Both men testified that the victim had suffered an abdominal wound in which a bullet entered the right side of the victim's body. Although the treating physician did not speculate as to the distance involved, the medical examiner testified that the burning around the wound indicated that the shot had been fired within one inch of the victim's body. Defendant's statements to police placed her in the front passenger's seat of the car. It is true that the prosecution made no attempt to explain why defendant would want to kill the victim. However, the fact remains that a jury could have inferred defendant's guilt based on defendant's proximity to the victim and the type of wound inflicted, as well as the fact that defendant did not take the victim to the nearest

hospital. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Therefore, although the trial court erred in delaying its decision, it did not err in denying defendant's motion for a directed verdict.[1]

II

Defendant next argues that her convictions violated her constitutional right not to be placed twice in jeopardy.[2] Specifically, defendant argues that the trial court actually acquitted defendant when it declared that there was insufficient evidence to support a conviction at the conclusion of the prosecution's case and then erroneously submitted the case to the jury. We review issues relating to double jeopardy de novo. *People v Parker*, 230 Mich App 337, 342; 584 NW2d 336 (1998).

Regardless of what it said on the record, the court did not grant defendant's motion. A court speaks only through its written orders. *People v Davie (After Remand)*,

---

[1]The trial court indicated that it was denying the motion, not because the evidence taken in a light most favorable to the prosecution supported a conviction, but merely because it feared reversal. Although the rationale was faulty, the Court will not reverse a trial court's decision where the court reached the right result for the wrong reason. *People v Ramsdell*, 230 Mich App 386, 406; 585 NW2d 1 (1998).

[2]US Const, Am V; Const 1963, art 1, §15.

225 Mich App 592, 600; 571 NW2d 229 (1997). Because defendant was never formally acquitted, the submission of the case to the jury was not a violation of defendant's constitutional rights. See *People v Mehall*, 454 Mich 1, 6-7; 557 NW2d 110 (1997).

III

Defendant next argues that the trial court erred in failing to determine whether defendant knowingly and intelligently waived her constitutional right to testify. We disagree. A trial court is not required to advise a defendant of his right to testify, nor must there be an on-the-record waiver of the right. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991).

IV

Defendant's final argument on appeal is that she was denied her constitutional right to be represented by counsel of her own choosing where the trial court refused to adjourn the case while her lead counsel was ill. We disagree. A trial court's grant or denial of a request for an adjournment is reviewed for an abuse of discretion. *People v Pena*, 224 Mich App 650, 660; 569 NW2d 871 (1997), modified on other grounds 457 Mich 883 (1998).

At the outset of trial, the court was informed that defense counsel, Arthur Brand, was unable to attend the trial due to health problems. Defendant requested an adjournment, but the court denied the request and ordered co-counsel, Rosemary Robinson, to proceed with trial. Defendant argues that, where she was deprived of the

attorney of her choice, reversal is mandated regardless of the adequacy of the substitute counsel's performance.

Defendant relies upon several federal cases to support her contention that the harmless error rule does not apply to the sixth amendment right to counsel. However, these cases all involved a trial court's denial of substitution of counsel for defendants who wanted to either fire their retained counsel or replace court-appointed counsel. See, e.g., *Bland v California Dept of Corrections*, 20 F3d 1469 (CA 9, 1994); *Wilson v Mintzes*, 761 F2d 275 (CA 6, 1985); *Releford v United States*, 288 F2d 298 (CA 9, 1961). In the present case, the facts surrounding the court's decision to proceed with trial are different from the cases cited by defendant.

Defendant was not denied the right to substitute counsel. Brand and Robinson had worked on the case together for some time, and Robinson was fully apprised of the facts surrounding the case. Therefore, defendant was actually represented by both attorneys and the absence of one was not a denial of counsel.

In *Morris v Slappy*, 461 US 1; 103 S Ct 1610; 75 L Ed 2d 610 (1983), the United States Supreme Court held:

> Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for

> compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel. [*Id.* at 11, quoting *Ungar v Sarafite*, 376 US 575, 589; 84 S Ct 841; 11 L Ed 2d 921 (1964).]

In *Morris*, the Court determined that the trial court did not abuse its discretion in denying the defendant's motion for a continuance because, although the defendant's attorney was legitimately ill, substitute counsel was available and fully prepared to proceed to trial. *Id.* Here, the court may have considered that the case was not highly complex in that it would last only two days. The court also considered the fact that Robinson had been sitting second chair on the case and was fully aware of the facts and strategy that defendant would employ. The court's decision, therefore, was not "unreasoning and arbitrary" and prejudice is not presumed. *Id.*

In order to show that a court's decision denying an adjournment was an abuse of discretion, defendant must show that she was prejudiced as a result of the court's decision. *Pena, supra*, 224 Mich App 661; *People v Krysztopaniec*, 170 Mich App 588, 598; 429 NW2d 828 (1988). Defendant does not argue that her defense was prejudiced as the result of Robinson's representation.

Accordingly, we hold that the trial court did not abuse its discretion when it refused to grant defendant's request for an adjournment.

Affirmed.

/s/ Janet T. Neff
/s/ Michael J. Kelly
/s/ Harold Hood

ORDER
OF
CONVICTION AND SENTENCE

STATE OF MICHIGAN	CASE NO/SUFFIX
□THIRD JUDICIAL CIRCUIT COURT	D36 # 94-63348-01 CTN 82-94-415351-01 94013107-01
XRECORDER'S COURT	LPD # 555025/SID #1762

THE PEOPLE OF THE STATE OF MICHIGAN
v.
DUBOSE, COHCHA, (DOB 1/01/35)
Defendant

1. At a session of the court on 2/26/97 before the Hon. DRAIN, GERSHWIN A a Judge of the court, the defendant was convicted by XJURY □ COURT □ PLEA, of the offense(s)
1) 750317 MURDER 2
2) 750227B-A FELONY FIREARM
PACC codes(s)

2. The defendant was in court for sentence on 3/21/97 and was sentenced by the court to:

□Probation _____ (see separate probation order)
Term of Years

XMichigan Department of Corrections, confined for a term of not less than 1) 5 Yrs.
2) 2 Years
nor more than 1) 10 years
2) 2 years.

The maximum statutory penalty for the crime(s) of which said defendant stands convicted is life years.

□Jail confinement for _____ days/months.

□The conviction is reportable to the Secretary of State under MCL257.732 or 281.1040.
The defendant's driver license number is _____.

□Other _____

RECOMMENDATION SENTENCE ON COUNT 1 RUNS CONSECUTIVE TO SENTENCE ON COUNT 2.
COURT SETS $50,000 PERSONAL BOND PENDING APPEAL. COMMENCEMENT OF SENTENCE IS DEFERRED PENDING DISPOSITION OF APPEAL.

□HIV testing was ordered on _____.
Date

The defendant was represented by ATTORNEY ARTHUR BRAND BAR NO P-11126

and is to be given credit for -2- days served in JAIL.

SAID CREDIT TO BE APPLIED TO MINIMUM AND MAXIMUM SENTENCE COMMITMENT PAPERS TO ISSUE.

/S/ Gershwin A. Drain
Judge

Detroit, Michigan
Tuesday, February 25, 1997
9:20 a.m.

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THE CLERK: This is Case No. 94-13107, People versus Concha DuBose, for continuation of trial.

MR. GONZALES: Good morning, Your Honor. James Gonzales on behalf of the People.

MS. ROBINSON: Your Honor, Rose Mary Robinson appearing on behalf of Miss DuBose.

THE COURT: Okay. All right, Miss Robinson, let's see, we've had just a brief in chambers discussion, and as I understand it Mr. Brand is not here and he's not going to be able to make it here today; is that correct?

MS. ROBINSON: It's my understanding having spoken to Attorney Arthur Brand that he is ill. That he is suffering from severe pain, medical problem, which requires him to see a doctor today. I understand it's quite serious. I think it involves kidney stones, which is very painful, and that there's blood in his discharge from his body. It's a very serious matter. Mr. Brand has been practicing law a long time. And that this is very serious, and I'm sure there's no malingering or any kind of excuse on his part. He was here yesterday. He was in discomfort yesterday and stayed through the whole day. He's a warrior. And I just would say that he's not here because he is ill.

In terms of my role in this case, Your Honor, I would ask the court to give us an adjournment. My role -- Mr. Brand has a mixed practice, and my practice is

primarily criminal law. It's all criminal law. So I have been asked by Mr. Brand if I would sit second chair for the purpose of helping him with evidentiary rules of evidence or any kind of procedural matters. I'm really here as a procedural lawyer as for support for Mr. Brand. He is the lawyer who was trying this case and whose client is Miss DuBose. I would ask the court to adjourn so that Miss DuBose can have the attorney of her choice, the lawyer she hired, Mr. Brand.

THE COURT: All right. Is that correct, Miss DuBose, you want to have Mr. Brand here to try the case for you?

THE DEFENDANT: Yes.

THE COURT: Okay. All right. Well, Mr. Brand is a good lawyer and he's been -- actually he's done pretty good on the case so far in the sense that there was an earlier motion to quash that was granted and the case was dismissed at an earlier point in time. And I guess, Miss Robinson, if you hadn't been here and hadn't been involved in the case for a little while, I wouldn't hesitate to continue the matter given Mr. Brand's illness and absence. And over your objection, Miss Robinson, and I understand you not wanting to proceed and prefer to have Mr. Brand here to try the case. Notwithstanding that, I think I'm going to go ahead. And even though Miss DuBose wants the attorney of her choice, Mr. Brand, to be here and to represent her, I'm going to go ahead and proceed with the case. And, Miss Robinson, if you were an inexperienced lawyer, I might feel differently about it, but you've been a criminal

practitioner for quite some time, and you are a very good lawyer, and you've enjoyed a high decree of success not only here in Recorder's Court but in the Court of Appeals and otherwise. And, you know, given your experience and your abilities and competence and so forth, I'm going to require that you proceed with the trial in this matter, over both your objection and your client's objection. So I'm going to go ahead and proceed to trial.

All right, any other preliminary matters before we proceed with the jury? Mr. Gonzales?

MR. GONZALES: Your Honor, there is one piece of evidence I'm still waiting on being delivered by the officer in charge. I'm ready to begin with opening. I think I have a witness or two. I've seen of course Miss McKay is here, my first witness, and beyond that I have one other witness who's present. Just letting the court know my status at this time.

THE COURT: All right. Then are you all ready to

Constitution of the United States
Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Constitution of the United States
Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it jurisdiction the equal protection of the laws.